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No. 88-1149

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

CESSNA AIRCRAFT COMPANY

Petitioner,

v.

MERILYN W. BUTCHER, MARTHA J. NOBLE, CAROLYN S. DURBIN

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

DAVID C. FRAZIER
GORDON, MYERS & FRAZIER
P. O. Drawer AA
Pascagoula, MS 39567
(601) 769-7754

Of Counsel:

FLOYD J. LOGAN
2211 24th Avenue
P. O. Box 1508
Gulfport, MS 39502
(601) 864-3666

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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STATEMENT OF THE CASE

Respondent sets forth supplemental facts in this case due to their omission in the Petition for Writ of Certiorari and their importance to this Court's consideration of the issues raised.

Petitioner, Cessna, filed its Motion for Summary Judgment in this case and attached to each Motion numerous exhibits. Included in the exhibits were the entire text of the depositions of the three widows, Butcher, Noble, and Durbin. In her deposition Mrs. Butcher testified that she was not aware of the potential of any lawsuit against Cessna Aircraft Company until

after the state court lawsuits were filed. (R. 3, 852, 853, 860-863). Carolyn Sue Durbin testified in her deposition that at the time of the filing of three State Court lawsuits:

> "As far as we knew, we really, I think at this point, we really didn't know quite what had happened. . . . We knew that there was an accident and we knew that . . . there was probably a reason, and there had to be a reason for it, but we just really didn't know what the reason was. At the time we just kind of probably trying to find out." (R. 11, 221).

It was only after the aircraft seat tracks were obtained and an expert opinion was rendered that Mrs. Durbin and her attorney concluded that the cause of the crash was the seat slippage (R. 11, 222-226). Mrs. Noble testified that at the time the Complaint was filed in the State Court lawsuit, she did not know why the plane had crashed. (R. 8, 411, 412). She further testified that at the time the State Court lawsuit was settled, it was decided to pursue a products liability action against Cessna. (R. 8, 414). She testified that her attorney made the decision to Sue Cessna. (R. 8, 415).

When the Court filed its Joint Memorandum Opinion, the three Plaintiffs filed a Motion to Reconsider based on the fact that the Court had made an erroneous fact finding that they knew of the liability of Cessna at the time the State Court actions were filed. (R. 4, 1204). The Motion for Reconsideration pointed out to the Court that there was no evidence to support this fact finding. In a further effort to clarify the issue, affidavits of the attorneys for each of the three Plaintiffs were submitted along with the Covenants Not to Sue and Indemnity Agreements. The affidavits and documents clearly demonstrated that the widows were not aware of Cessna's

liability based on the seat defect at the time the State Court lawsuits were filed. This knowledge was gained only during discovery which included locating the seat tracks and employing an expert to examine them and express an opinion that the seat defect and resulting slippage caused the crash. (R. 4, 1210, 1221). The affidavits pointed out that as part of the settlement, the Plaintiffs reserved their rights against Cessna and that the liability carrier of Gulf Park Aviation, Ideal Mutual, was to share in any eventual recovery against Cessna in the products liability suit. The Court refused to consider the affidavits and overruled the Motion to Reconsider. (R. 6, 1928-1930).

SUMMARY OF THE ARGUMENT

Petitioner cites cases decided by the various Circuit Courts of Appeal and argues that these cases represent conflicting decisions. Petitioner argues that this Court should grant Certiorari to bring uniformity and finality to Rule 56 F.R.C.P. However, the cases cited by Petitioner as representing conflicting decisions to the Fifth Circuit decision herein and those in other Circuits, are clearly distinguishable from this case. All of these cases dealt with either factual or legal issues, raised for the first time before the Courts of Appeal. The factual issue of the knowledge of the widows necessary for an informed election of remedies, was before the trial Court in the depositions of the widows attached to Cessna's Motion for Summary Judgment. Moreover, following the Court's ruling, Respondents timely filed Petitions for Reconsideration, attaching affidavits from attorney's for the

widows in the state Court actions. These affidavits clearly presented material issues of disputed fact as to the widows knowledge of Cessna's liability at the time the state actions were filed and demonstrated an election to proceed against Cessna at the time the state court's actions were dismissed. The trial Court considered these affidavits in it erroneous decision to reaffirm its grant of Summary Judgment. Petitioners underlying basis for petitioning for Certiorari is, therefore, unsound.

REASONS FOR NOT GRANTING THE WRIT

I.

THE LINE OF CASES CITED BY PETITIONER AS DEMONSTRATING AN ALLEGED CONFLICT AMONG THE CIRCUITS, DO NOT APPLY TO THE FACTS OF THIS CASE.

In an effort to justify its application for Certiorari, Petitioner attempts to demonstrate a conflict amongst the various Federal Courts of Appeal. However, assuming for purposes of argument that there is any such conflict, the facts of this case are distinguishable from the facts of the line of cases cited by Petitioner as being in conflict with the Fifth Circuit's decision in this case. All of the decisions cited by petitioner from the First Circuit, Third Circuit, District of Columbia, and Seventh Circuit Courts as conflicting with the Fifth Circuit opinion in this case, deal with either facts which are presented for the first time to the Court of Appeals or to legal issues raised for the first time in the Court of Appeals. This case is clearly distinguishable because the testimony demonstrating the disputed issues of material fact was clearly before the

trial Court in the form of the deposition of the three widows. In addition, the trial Court had ample opportunity to deliberate the impact of the affidavits of Plaintiff's attorneys and attached exhibits prior to refusing to reconsider its granting of the Motion. As shown by the trial Court's Joint Memorandum Order, it clearly was aware of the content and issues raised by the affidavits. (R. 9, p. 811, 813).

The inapplicability of the line of cases cited by petitioner is vividly demonstrated by its citing the case of *Sound Shipbuilding Corporation v. Bethlehem Steel Company,* 533 F.2d 96 (C.A. 3rd 1976). On Page 7 the Petitioner states that the *Sound Shipbuilding* case is "a case much like the present one where a Plaintiff attached affidavits to its petition for rehearing." The Petition for Rehearing in that case was filed with the Circuit Court of Appeals and the affidavits were filed in support of the Petition for Rehearing in that case. The facts of that case are grossly distinguishable from this one where Plaintiffs filed their affidavits and exhibits with the District Court and the District Court examined and considered the affidavits and exhibits in making its ruling.

The *Voutour v. Vitale* case, 761 F. 2d 812 (C.A. 1st, 1985) cert. den. 474 U.S. 1160, (1986) relied upon by Petitioners is also clearly distinguishable. In *Vortour,* the District Court ruled on a Summary Judgment 1 year prior to trial. On Appeal the Summary Judgment was attacked based on facts presented for the first time at trial. Here, immediately following the court's ruling, the District Court was apprised of the factual issue it had assumed was undisputed.

Cessna attacks the affidavits of the attorneys on the grounds that attorneys' affidavits are not proper evidence in support of the motion. However, the cases cited by Petitioner as refusing to consider attorneys' affidavits do so on the grounds that under Rule 56(e) of the Federal Rules of Civil Procedure, the affidavits must be based on personal knowledge of the affiant.

Moore's On Federal Practice states:

> "Any attorney does, however, have the right to submit his own affidavit when he is competent to testify to facts within his personal knowledge." §56.22 [1] "Form and Content of Affidavit; Further Testimony," at p. 56, 1320-1321.

In a case that also involved the question of the terms of a settlement, attorney's affidavits were admitted in support of such facts. *Lockwood v. Wolfe Corporation, Inc.*, 629 F.2d 603 (C.A. 9th, 1980). To hold otherwise, would deprive a party of the testimony of the person most knowledgable of the terms and background of the settlement documents.

Cessna argues that the Court of Appeals improperly relied on "widow's affidavits" which are not in the record. It is clear from a reading of the entire paragraph quoted by Cessna, that the Court of Appeals was referring to the widow's attorneys' affidavits. (Appendix A, to Petitioners' Brief p. 13).

The District Court clearly had before it competent evidence sufficient to withstand Petitioner's Motion for Summary Judgment.

II.

THE *CELOTEX* CASE IS INAPPLICABLE WHERE THE EXHIBITS SUBMITTED BY MOVANT IN SUPPORT OF THE MOTION FOR SUMMARY JUDGMENT DEMONSTRATE THE EXISTENCE OF A DISPUTED MATERIAL FACT ISSUE.

Petitioner's reliance upon this Court's decision in the case of *Celotex Corporation v. Catrett*, 477 U.S. 317, (1986), is misplaced. Petitioner argues that Respondent merely presented the Response to Itemization of Facts Relied upon by Cessna and a brief in opposition to its Summary Judgment. It is first pointed out that, this case is distinguishable from *Celotex* on the basis that, in *Celotex* the nonmoving party bore the burden of proof at trial as to a dispositive issue. In this case Cessna, the movant, bore the burden of proof as to its affirmative defenses of election of remedies or judicial estoppel. The nonmovant is not required to produce additional evidence where the depositions and other exhibits submitted by the movant in support of the Motion demonstrate the existence of a material issue of disputed fact. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 88 S. Ct. 1575, 20 L.Ed. 2d 569 (1960), *Kirk v. Home Indemnity Company*, 431 F.2d 554 (C.A. 7th 1970). Petitioner's reliance upon *Celotex* is, therefore misplaced.

Finally, it should be recognized, that it was Petitioner's own failure to comply the local Court rules which resulted in the error of the District Court. It was Cessna's duty under Rule 8(d) of the United States District Court for the Southern District of Mississippi to specifically itemize the facts upon which it relied in support of the Motion for Summary Judgment and as to

which there was no dispute in a written pleading. Local Rule 8(d) (Copy attached hereto).

An obvious purpose of this rule is to determine whether the identified undisputed facts, as a matter of law, constitute grounds for Summary Judgment. Cessna, bearing the burden of proof on its affirmative defense, had the duty under Local Rule 8(d), to itemize the specific undisputed facts which allowed it to invoke the doctrines of judicial estoppel or election of remedies.

> "Thus if the movant bears the burden of proof on an issue, either because he is the Plaintiff or as a defendant he is asserting an affirmative defense, he must establish beyond peradventure *all* of the asserted elements of the claim or defense to warrant judgment in his favor. *Fontenot v. Upjohn*, 780 F.2d, 1190, (C.A. 5th 1986) at p. 1194.

Cessna did not provide affidavits with specific factual allegations in support of its Motion, but attached a two inch volume of exhibits containing various depositions, pleadings and other materials. Cessna made no designations as to what specific portions of its exhibits it was relying upon. In its itemization of undisputed facts upon which it relied, Cessna presented no facts upon which it could be concluded or inferred that (a) Plaintiff knew of their causes of action against Cessna at the time the State Court suits were filed, and (b) the later settlement of these actions and the Declaratory Judgment action was a conscious election not to sue Cessna. (R. 3, p. 1097, R. 7 p. 653, R. 10, p. 432). Since Cessna failed to comply with the local rule and identify these facts as undisputed and relied upon in the Motion, Plaintiffs were not called upon to rebut them with any proof. When the Court improperly made fact findings on these issues in

its opinion, Plaintiff's counsel filed the Motion for Reconsideration with the attorneys' affidavits and exhibits attached to advise the Court that its fact findings were not supported by the Record and incorrect. Cessna having failed in its initial burden to identify the specific facts upon which it relied in support of its Motion for Summary Judgment based upon its affirmative defense, was responsible for inducing the error of the trial Court. There is no sound policy reason why Cessna's lawyers should be "rewarded for less than diligent work." (Petitioner Brief, p. 11).

CONCLUSION

For the foregoing reasons Cessna's Petition for Certiorari should be denied.

Respectfully submitted,

MERILYN W. BUTCHER,
MARTHA J. NOBLE,
CAROLYN S. DURBIN

BY: /s/ David C. Frazier
DAVID C. FRAZIER

DAVID C. FRAZIER
GORDON, MYERS & FRAZIER
P. O. Drawer AA
Pascagoula, MS 39567
(601) 769-7754

FLOYD J. LOGAN, Of Counsel
Attorney at Law
P. O. Box 1508
2211 24th Avenue
Gulfport, MS 39502
(601) 864-3666

APPENDIX

Rule 8. Motion Practice

(a) **Applicability.** The provisions of this rule apply to all written motions filed in civil actions.

(b) **Filing; Proposed Orders.** The original of each motion, and all affidavits and other supporting documents shall be filed with the Clerk at the division office where the action is docketed. The moving party at the same time shall mail a copy thereof to the Judge presiding in the action at his home office mailing address, or, if the motion is referred to a Magistrate, to the Magistrate at his home office mailing address.

A proposed order shall accompany the court's copy of any motion which may be heard *ex parte* or is to be granted by consent. If the motion is referred to a Magistrate, the proposed order shall be furnished to the Magistrate with a copy of the motion.

(c) **Responses.** The original of any response to the motion, all opposing affidavits, and other supporting documents shall be filed with the Clerk at the division office where the action is docketed and any response to the motion and all objections shall be filed and copies distributed as provided in Paragraph (b) of this rule.

(d) **Memoranda; Documents Required With Motions to Dismiss or for Summary Judgments; Failure to Submit Required Documents.** At the time the motion is served, other than motions or applications which may be heard *ex parte* or those involving necessitous or urgent matters, counsel for movant shall mail to the Judge or Magistrate in charge of the case the original and one copy

of a memorandum of authorities upon which he relies. Counsel for respondent shall submit the original and one copy of a memorandum of authorities in reply, and shall do so within ten (10) days after service of movant's memorandum. Counsel for movant desiring to submit a rebuttal memorandum may do so within five (5) days after the service of the respondent's memorandum. Any requests for extension of time shall be made in writing to the Judge or Magistrate before whom the motion is noticed. Memoranda submitted in connection with any dispositive motion shall be accompanied by separate proposed findings and conclusions. In all motions for summary judgment the movant must file with the Clerk as a part of the motion an itemization of the facts relied upon in support of the motion which he claims to be both material and as to which there is no genuine issue. The respondent shall either agree that the facts listed by the movant are undisputed or shall state with specificity those facts which are contested and the reasons therefore. In the event of cross-motions for summary judgment in which the parties agree on the facts, the parties shall file a stipulation of uncontested facts. Motions to dismiss and for summary judgment shall also be accompanied by copies of the complaint and, if an answer has been served, the answer. Counsel shall strictly comply with the requirements of Rule 6(c) in connection with motions to compel discovery. Failure to timely submit the required motion documents may result in the denial of the motion and/or the imposition of appropriate sanctions.

(e) **Length of Memoranda.** Movant's original and rebuttal memoranda together shall not exceed a total of thirty-five (35) pages, and respondent's memorandum

shall not exceed thirty-five (35) pages, Memoranda and other submissions required by Paragraph (d), except as therein provided, are not to be filed with the Clerk's office.

(f) **Notice and Hearings.** All motions in which a hearing is requested shall be noticed for hearing "as soon as counsel can be heard" but no date certain shall be set by the moving party.

All motions shall be decided by the Court without a hearing or oral argument unless otherwise ordered by the Court on its own motion, or, in its discretion, upon written request made by counsel in an easily discernible manner on the face of the emotion or response.

The scheduling of an evidentiary hearing or oral argument, where allowed, shall be set at such time and place as may suit the convenience of the Judge or Magistrate assigned to the case. The Court may, in its discretion, hear oral argument by telephone conference.

(h) **Service.** Movant and respondent shall serve copies of all motions, responses, and/or memoranda upon opposing counsel. When service is by mail, three (3) days shall be added to the periods prescribed in Paragraph (d) of this rule.

(i) **Role of the Magistrate.** All pretrial motions are hereby referred to a Magistrate for hearing and determination in accordance with the provisions of Rule 74, FRCP, with the exception of motions for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can

be granted, to involuntarily dismiss an action, motions in limine regarding evidentiary matters, and for extensions of time with regard to matters pending before a District Judge. Upon entry of a Pretrial Order, all motions thereafter served shall be submitted to the assigned trial judge.

(l) **Untimely Motions.** Any motion served beyond the motion deadline imposed in the Scheduling Order entered pursuant to Rule 6(d), with the exception of in limine evidentiary motions, may be denied solely because the motion is served untimely.

(m) **Sanctions – Frivolous Motions or Opposition.** A patently frivolous motion or opposition to a motion on patently frivolous grounds may result in the imposition of appropriate sanctions, including the assessment of costs and attorney's fees.